STATE OF CALIFORNIA

PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

June 8, 1994

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20036

Re: GN Docket No. 93-252

Dear Mr. Caton:

Please find enclosed for filing an original plus eleven copies of the PARTIAL OPPOSITION TO PETITIONS FOR RECONSIDERATION OR CLARIFICATION filed by the People of the State of California and the Public Utilities Commission of the State of California in the above-referenced docket.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed, postage pre-paid envelope.

Very truly yours,

Ellen S. LeVine
Attorney for California

ESL:lkw

Enclosures (13)

ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252

FILED
JUN 9 1994
FCC MAIL ROOM

PARTIAL OPPOSITION TO PETITIONS FOR RECONSIDERATION OR CLARIFICATION

The People of the State of California and the Public Utilities Commission of the State of California ("California") hereby submit this partial opposition to the Petition for Reconsideration or Clarification filed by MCI Telecommunications Corporation ("MCI"), and Petition for Clarification and Partial Reconsideration filed by GTE Service Corporation ("GTE") in the above-entitled proceeding.

Each petition asks the Federal Communications Commission ("FCC"), among other things, to expand the scope of federal preemption of state authority over commercial mobile radio services ("CMRS"). For the reasons stated below, California respectfully requests the FCC to deny these petitions.

Under the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), Congress preempted the states from regulating the entry of CMRS providers and from prescribing rates for the services offered by such providers. Section 332(c)(3). Congress, however, did not preempt the states from prescribing rates charged by local exchange carriers ("LECs") for the

interconnection of CMRS providers with the public switched network. To the contrary, in Section 332(c)(1)(B), Congress made clear that the FCC's authority over interconnection is no different (i.e., no greater or lesser) than its authority under Section 201 of the Communications Act. Under the latter section, and consistent with the dual regulatory scheme of the Communications Act, the FCC has always confined its ratemaking authority over interconnection (i.e., access charges) to interstate service providers. With respect to intrastate providers, the states have always set intrastate interconnection (or access) charges.

Moreover, in Section 332(c)(3) of the Budget Act, Congress carefully defined the scope of federal preemption as limited to state regulation of "... the rates charged by any commercial mobile service or any private mobile service ..." Interconnection rates are charges paid by CMRS providers to local exchange carriers, not rates charged by CMRS providers to their customers, and hence do not fall within the scope of federal preemption. To the contrary, Congress expressly reserved state authority over other terms and conditions governing CMRS. Section 332(c)(3).

In its Second Report and Order, the FCC declined to preempt state authority over intrastate interconnection rates charged by local exchange carriers to cellular carriers. Second Report and Order at ¶231. As explained by the FCC, because "LEC costs associated with the provision of interconnection for interstate and intrastate cellular services are segregable" there was no basis upon which to preempt the states. Id. The FCC then applied the same reasoning in declining to preempt state

authority over intrastate interconnection rates governing paging carriers. Id.

In its petition, MCI acknowledges that the FCC's "decision to refrain from preempting state regulation of the rates that LECs may charge CMRS providers for intrastate interconnection is consistent with precedent and the general preservation of state/federal jurisdiction under OBRA [Budget Act]..." MCI Pet. at 14. Nevertheless, MCI urges the FCC to clarify that the states may not set intrastate interconnection rates charged by LECs, or establish other terms and conditions, which hinder entry of CMRS providers.

The FCC should decline MCI's request for two reasons. First, there is no evidence that any state intends to set rates or other terms and conditions applicable to CMRS providers which would burden or bar their entry into intrastate markets. California in particular is on record as strongly encouraging new competitive entrants into intrastate markets. Enhancing California's Competitive Strength: Strategy for Telecommunications Infrastructure, November 1993. It is simply premature and speculative to conclude that some state might at some time adopt rates or other terms and conditions governing CMRS that might be considered too onerous.

Second, in enacting the Budget Act, Congress preserved the dual regulatory scheme of the Communications Act with respect to interconnection rates applicable to CMRS. 47 U.S.C. § 152(b). Under that scheme, Congress fences off from FCC reach or regulation authority over intrastate interconnection rates. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986);

California v. FCC, 798 F.2d 1515, 1519-20 (D.C. Cir. 1986). Accordingly, the FCC lacks lawful authority to preempt state authority to prescribe intrastate interconnection rates which a state deems just and reasonable.[1]

GTE further petitions the FCC to clarify that enhanced services offered by CMRS providers fall within Title II of the Communications Act, and hence would be subject to the preemptive rate and entry provisions of the Budget Act. GTE Pet. at 12. GTE seeks such clarification in order to "minimize state regulation of innovative, advanced radio services." Id.

The FCC should also decline to clarify its order in this respect. Once again, at this time it is simply premature and speculative to assume, in the absence of any evidence, that any state will, or has taken, any action which will undermine the provision of "innovative, advanced radio services."[2] Indeed, in California the evidence is to the contrary. California is fostering the provision of such services, not hindering them, by determining the extent to which it should ease or eliminate its regulation of wireless service providers. Investigation on the

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1. Inconsistently, in its comments before the FCC, MCI supported the FCC's proposal not to preempt state authority over intrastate interconnection rates charged by LECs to personal communication services providers, a type of CMRS provider. Second Report and Order at ¶226 and note 468.

2. Moreover, GTE identifies no services which it has, or intends to offer, for which it is "unsure what regulatory requirements apply." GTE Pet. at 12. It therefore is not clear whether uncertainty or confusion would even exist with respect to the requirements governing these unknown services.

Commission's Own Motion into Mobile Telephone Service and Wireless Communications, I.93-12-007 (12-17-93).

Moreover, placing enhanced services offered by CMRS providers within Title II would mean that such services are common carrier services. Second Report and Order at ¶54. The FCC, however, long ago established that such services, when provided interstate, are non-common carrier services, and hence would not be subject to the FCC's regulatory authority under Title II. California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Computer & Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983). GTE's request would abrogate this longstanding federal regulatory scheme based on vague assertions of uncertainty and confusion in complying with that scheme.

Further, in its Second Report and Order, the FCC carefully defined the criteria by which a service would qualify as CMRS. GTE's request would require the FCC to substantially change that criteria in order to include enhanced service offerings.

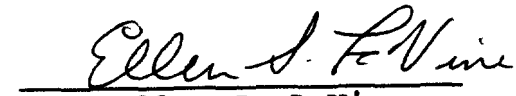
Finally, as a matter of law, there is no valid basis for preempting state authority over intrastate enhanced services offered by local exchange carriers, based on the technology by which the services are provided. In California v. FCC, the court affirmed that Congress intended to preserve state authority over intrastate enhanced services offered by local exchange carriers. 905 F.2d 1217, 1239-1242. Nothing in the Budget Act indicates an intent by Congress to eliminate pre-existing state authority with respect to enhanced services.

CONCLUSION

For the reasons stated, the petitions of MCI and GTE, insofar as they seek to expand the scope of federal preemption of state authority to include intrastate interconnection rates, other terms and conditions governing CMRS, and wireless enhanced services offered by local exchange carriers, should be denied.

Respectfully submitted,

PETER ARTH, JR.
EDWARD W. O'NEILL
ELLEN S. LEVINE

By: 
Ellen S. LeVine

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505 Van Ness Avenue
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June 8, 1994

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all known parties of record in this proceeding by mailing by first-class a copy thereof properly addressed to each party.

Dated at San Francisco, California, this 8th day of June, 1994.

Ellen S. LeVine